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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Establishment of a Class A Television Service	)	MM Docket No. 00-10

To: The Commission

PETITION FOR RECONSIDERATION

USA Broadcasting, Inc. ("USAB"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, respectfully hereby petitions for reconsideration of the *Report and Order* in the above-captioned proceeding. 1/

In the *Report and Order*, the Commission adopted rules implementing the Community Broadcasters Protection Act (the "CBPA"), in which Congress directed the FCC to create a Class A television service in order to confer "primary" status on a select class of low-power television stations ("LPTV"). 2/ The rules, as adopted, fail to satisfy the Commission's statutory obligation under the CBPA to determine, on a case-by-case

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1/ *See* Report and Order, *Establishment of a Class A Television Service*, MM Docket No. 00-11, 15 FCC Rcd 6355 (released April 4, 2000) (the "*Report and Order*"). A summary of the Report and Order was published in the Federal Register on May 10, 2000. Accordingly, this petition for reconsideration is timely filed. *See* 47 C.F.R §§ 1.4, 1.429.

2/ LPTV stations, as "secondary" services, have been obligated to "yield to facilities increases of existing full-service stations or to new full-service stations where interference occurs." *See Report and Order* in BC Docket No. 78-253, 51 R.R. 2d 476, 486 (1982).

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basis, whether granting Class A status to certain LPTV stations would serve the public interest.

I. CONGRESS HAS PROVIDED THE COMMISSION WITH BROAD DISCRETION IN DETERMINING WHETHER AN LPTV STATION QUALIFIES FOR CLASS A STATUS UNDER SECTION (f)(2)(B) OF THE CBPA.

The CBPA directed the Commission to establish rules that allow "qualifying" LPTV station to elect Class A status. Section (f)(2)(A) of the CBPA defined "qualifying low-power television stations" as those which during the 90 days preceding the date of enactment of the statute: (1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least three hours per week of programming produced within the market area served by the station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such a group; and (3) is in compliance with the Commission's requirements for LPTV stations. 3/

However, Congress did not stop there. In Section (f)(2)(B) of the CBPA, Congress specifically expanded the universe of "qualifying" LPTV stations to include a station "if the Commission determines that the public interest, convenience and necessity would be served by treating the station as a qualifying low-power television station . . . or for *any other reasons* determined by the Commission." 4/

Although the plain language of the statute expressly provides the Commission with great flexibility in determining whether an LPTV station "qualifies" for Class A status (*i.e.*, the Commission can "treat" a station as "qualifying," either because

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3/ 47 U.S.C. 336(f)(2)(A)(1).

4/ 47 U.S.C. 336(f)(2)(B) (emphasis added).

it is in the public interest or for *any other reasons*), the Commission has, without adequate explanation, ignored the purpose of Section (f)(2)(B) and rather has chosen to construe its options narrowly. Specifically, in the *Report and Order*, the Commission determined that it "will allow deviation from the strict statutory eligibility criteria [of Section (f)(2)(A)] only where such deviations are insignificant or when [it] determine[s] that there are compelling circumstances, and in light of those compelling circumstances, equity mandates such a deviation." The *Report and Order* went on to proffer that that "[e]xamples of such compelling circumstances include a natural disaster or interference conflict which forced the station off the air during the 90 day period before enactment of the CBPA."

In the text and legislative history of the CBPA, Congress gave the Commission the clearest of direction in establishing that "[i]n the alternative [to Section (f)(2)(A)], the FCC may qualify an LPTV station as a Class A licensee if it determines that such qualification would serve the public interest, convenience and necessity or for other reasons determined by the FCC." 5/ Yet the *Report and Order* offers no discussion or justification for the Commission's abdication of its responsibility to develop its own set of criteria for determining Class A "qualification" pursuant to Section (f)(2)(B). Rather, the Commission merely read Section (f)(2)(B) as an "extension" of Section (f)(2)(A) and only provided a severely constricted safety valve for LPTV stations that narrowly miss, for reasons beyond their control, the criteria set forth in Section (f)(2)(A). Without discussion or explanation, the Commission has ignored Congress'

5/ *See* Section-by-Section Analysis to S. 1948, the Act known as the "Intellectual Property and Communications Omnibus Reform Act of 1999," as printed in the Congressional Record of November 17, 1999. 145 Cong. Rec. S 1469-03, S 14725.

direct instruction in Section (f)(2)(B) of the CBPA to offer Class A status where the public interest would be served – or for *any other reasons*.

If Congress had wanted to restrict the ability of the Commission to grant other LPTV stations Class A status under Section (f)(2)(B), it could have limited the FCC's authority to qualifying a station only where it deviates insignificantly from the criteria established in Section (f)(2)(A). 6/ But Congress did not do that. Congress acknowledged the Commission's expertise in determining what other circumstances might qualify an LPTV station for Class A eligibility and drafted Section (f)(2)(B) of the CBPA as broadly as one could imagine to allow the FCC to apply its expertise and to exercise its discretion. 7/ Frankly, it is quite uncharacteristic of the Commission to shy away from applying its expertise in determining whether the public interest would be served. 8/

6/ Arguably, even without Section (f)(2)(B), the Commission already has authority to allow *de minimis* exceptions to the statutory criteria contained in Section (f)(2)(A), so long as they do not undermine the statutory policy -- *de minimis non curat lex* ("the law cares not for trifles"). *See, e.g.,* Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 230 (1992); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992); Hudson v. McMillian, 503 U.S. 1, 8-9 (1992).

7/ In the Report and Order, the Commission recognized that it has authority, through a notice and comment rulemaking proceeding, to develop eligibility requirements and to confer primary status, independent of the CBPA. *See Report and Order*, 15 FCC Rcd at 6369-70. Moreover, in the *Report and Order*, the Commission announced its intention to institute such a proceeding to determine whether translators – and presumably LPTV stations – that did not qualify under the terms of CBPA, should be granted some form of primary status. *Id.*

8/ The Commission's self-imposed narrow interpretation of its "public interest" authority to confer Class A status is in stark contrast to the Commission's long history of construing the public interest mandate contained in Section 303 of the Communications Act broadly, 47 U.S.C. § 303. *See, e.g.,* Report and Order, *In The Matter Of Review Of The Commission's Broadcast And Cable Equal Employment Opportunity Rules And Policies*, 15 FCC Rcd 2329 (2000) (Commission found that it had statutory authority to implement Broadcast and Cable EEO rules based, in part, on its finding that equal

II. IN FACT, CONGRESS HAS INDICATED THAT THE COMMISSION SHOULD GRANT WHOLE OTHER CLASSES OF LPTV STATIONS CLASS A STATUS.

Congress did make clear that other types of LPTV stations might be able to qualify for Class A status under the alternative criteria pursuant to Section (f)(2)(B). Specifically, in the CBPA, Congress found that "[i]t is in the public interest to promote diversity in television programming such as that currently provided by low-power television stations to foreign-language communities." 9/ Despite this congressional guidance, which underscored that LPTV stations beyond the single class of stations named in Section (f)(2)(A) of the Act merited protection, the Commission nonetheless concluded in the *Report and Order* that Congress' intent was to limit the class of qualifying stations to "existing LPTV stations that were providing local programming." 10/ This logic simply begs the question.

Congress established local programming thresholds (three hours per week) in Section (f)(2)(A) and presumably did not intend for *any* LPTV station to qualify under Section (f)(2)(A) of the CBPA if it failed to meet this minimum (ignoring *de minimis* exceptions), or for that matter, if it failed to meet any of the other prongs of Section (f)(2)(A). But this analysis is simply inapplicable to Section (f)(2)(B). In Section (f)(2)(B), Congress established an independent obligation for the Commission

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employment of minorities and women furthers the public interest goal of diversity of programming, both directly and by enhancing the prospects for minority and female ownership).

9/ Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. Appendix I at 1501A-595.

10/ *Report and Order*, 15 FCC Rcd at 6369.

to determine whether there are public interest reasons – or *any other reasons* – that LPTV stations should qualify for Class A status.

III. THE COMMISSION SHOULD DELEGATE AUTHORITY TO THE STAFF TO DETERMINE ON A CASE-BY-CASE BASIS WHETHER AN LPTV STATION "QUALIFIES" UNDER SECTION (f)(2)(B) OF THE CBPA.

The Commission must evaluate each timely filed LPTV "certificate of eligibility" in order to determine if the LPTV station "qualifies" under the Section (f)(2)(B). 11/ Simply put, the Commission must make an independent determination whether each of these stations "qualifies" either because it is in the public interest -- or for *any other reason*.

Surely the CBPA does not mandate that the Commission deny Class A status to an LPTV station that offers the only noncommercial service received in its operating area, consisting of 15 hours a day of noncommercial children's programming. Is such a service not in the public interest? Whatever the criteria may be, the Commission has an obligation under Section (f)(2)(B) to determine which LPTV stations qualify for Class A status (whether because it is in the public interest, *or for other reasons*). An abdication of this responsibility is to determine that Congress did not intend the Commission to exercise the discretion given to it by Section (f)(2)(B) and effectively renders Section (f)(2)(B) of the CBPA meaningless. 12/

11/ Each LPTV licensee seeking Class A designation was required, by January 28, 2000, to submit to the Commission a certificate of eligibility based on the qualification requirements contained in either Section (f)(2)(A) or Section (f)(2)(B) of the CBPA.

12/ As the Commission recently noted, "[i]t is a basic rule of statutory construction that a statute is presumed to have some meaning and application." *See* Memorandum Opinion and Order, *In the Matter of the Applications of Shareholders of CBS Corp.*, FCC 00-115 at ¶ 10 (released May 3, 2000).

IV. CONCLUSION

Accordingly, and for all the foregoing reasons, USAB hereby respectfully urges the Commission to better implement the intent of Congress and to better serve the public interest by enabling the Commission Staff to determine what other LPTV stations merit Class A status.

Respectfully submitted,

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